In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 985

NEUHOFF BROS. PACKERS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B–1 to B–11) is reported at 362 F. 2d 611. The Board's decision and order (R. 358–371; 382–385) [1] is reported at 154 NLRB 438.

JURISDICTION

The judgment of the court of appeals was entered on June 17, 1966 (Pet. App. B–1). Petitioner's request for rehearing was denied on November 16, 1966 (Pet. App. B–14). The petition for a writ of certiorari was filed on January 19, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "R." refers to the transcript of record (Vol. 1) in the court below.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), and of the Board's Rules and Regulations (29 C.F.R. § 102.1 *et seq.*), are set forth in the Appendix, *infra*, pp. 9–11.

QUESTION PRESENTED

Whether an employer was entitled to an evidentiary hearing on objections to two representation elections, where the objection to the first election did not raise a material issue of fact, and the objection to the second election not only likewise presented no material issue of fact, but could not affect the outcome of that election.

STATEMENT

Petitioner (the Company) is engaged in the slaughter of livestock and the processing and sale of the carcasses (R. 14–15, n. 3). In July 1964, the United Packinghouse, Food and Allied Workers of America, AFL–CIO (the Union) filed a petition with the Board requesting certification as the bargaining agent for a unit of the Company's employees (R. 1–12). On September 22, 1964, the Board conducted a representation election in which 315 votes were cast for the Union, 347 against, and 43 ballots were challenged (R. 41–42). The Union filed timely objections to the election (R. 45–53), which the Board's Regional Director investigated. The Director found, on the basis of undisputed evidence, that, in the presence of other voters and in an area clearly visible to employees on their way to vote, a Company official refused to permit three previously discharged em-

ployees to enter the plant and vote, even though he was advised by a Board agent that the three employees were eligible to cast ballots (R. 71–72).[2] The Director further found that, prior to the election, the Company's supervisors individually interviewed employees away from their work stations and urged them to vote against the Union (R. 67–69). On the basis of these findings, the Director concluded that the Company had engaged in "conduct reasonably calculated to interfere with a free choice in the election," and therefore set aside the election and ordered a new one (R. 91). The Board denied the Company's request to review the Regional Director's decision (R. 92–119), on the ground that "it raises no substantial issues warranting review" (R. 119–120).

A second election was held on February 18, 1965, in which 388 votes were cast for the Union, 295 against, and 58 ballots were challenged (R. 125–126). The Company filed timely objections to the election, alleging that the conduct of Board agents in refusing to permit 13 persons to cast ballots impaired the validity of the election (R. 128–164). The Regional Director, upon investigation, found that the 13 individuals had been denied ballots because, in connection with the first election, they had been found to be supervisory personnel. Since these employees were thus not eligible to vote, he concluded that their exclusion was proper (R. 167–171). Accordingly, the Director overruled the Company's objections and certified the

[2] A Board Trial Examiner had issued a decision finding that two of the employees had been discharged in violation of the Act (R. 71; see also Pet. App. B–6, n. 1).

Union as the bargaining representative of the Company's employees (R. 171–172). The Board again denied the Company's request for review of the Director's decision (R. 173–189), because "no substantial issues warranting review" were raised (R. 190–191).

Thereafter, the Company refused the Union's request to bargain, the Union filed unfair labor practice charges (R. 191–194), and a complaint was issued (R. 195–214). Pursuant to the General Counsel's motion for judgment on the pleadings (R. 223–252), the Trial Examiner directed the Company to indicate the factual issues it intended to raise (R. 287–293). Upon consideration of the Company's response (R. 311–350), the Examiner found that there was no dispute as to the facts upon which the Regional Director had relied in setting aside the first election, and that, as to the second election, a bare allegation challenging the manner in which Board agents had refused ballots to individuals already determined to be supervisory personnel did not raise an issue of fact (R. 364–365). The Examiner further found that the issues of law raised by the Company had already been decided in the representation proceedings, and that he was bound by those determinations (R. 365–366). Accordingly, the Examiner, granting the motion for judgment on the pleadings, held that the Company had violated Sections 8(a)(5) and 8(a)(1) of the Act by refusing to bargain with the Union (R. 359, 366). The Board affirmed the Examiner's conclusion and ordered the Company to bargain, on request, with the Union (R. 382–385). Upon review, the court of appeals held

that the Board's order should be enforced, rejecting the Company's attempt to have that order set aside (Pet. App. B–1 to B–11).

ARGUMENT

The petition is predicated on the premise that the objections to the representation elections in this case presented material issues of fact, which the Board should not have decided without an evidentiary hearing.[3] But, as shown below, the objection as to the first election which was decisive presented no material issue of fact, and the objection as to the second election related to a matter which could not affect the result of the election, and likewise presented no material issue of fact. In these circumstances, the court below correctly concluded that the Board properly disposed of the objections without an evidentiary hearing.[4] There is thus no occasion for further review.

1. The first election was validly set aside if *either* of the two grounds relied on by the Regional Director is sustainable (see note 6, *infra*). With respect to the Company's action in preventing three persons from voting, the court below found that the undisputed

[3] Section 102.69(c) of the Board's Rules (Appendix, *infra*, pp. 10–11) provides for an evidentiary hearing where objections present "substantial and material factual issues."

[4] In reaching its result, the court below indicated that it was assuming, in light of the procedural posture of the case, "that for the Board to prevail, any factual issues that may have properly been raised before the Board, are to be viewed most strongly from the standpoint of the company," except for that relating to "the appropriateness of the bargaining unit," as to which "there was a hearing and resolution of the issue by the Director" (Pet. App. B–4). See note 5, *infra*.

facts[5] were that three former employees, accompanied by two labor organizers, "'in obvious view of everyone, began to march into the plant through the front gate'." They were met "in the middle of the gate" by Mr. Neuhoff (see note 5, *supra*), who "told them in a normal tone of voice that they could not come in to the plant because their names were not on the voting eligibility list" (Pet. App. B–6). With these facts undisputed, there was no need for an evidentiary hearing since only a legal issue was presented—*i.e.*, whether the conduct of the Company representative, in turning workers away "in an area clearly visible to employees on their way to vote," was such as to destroy the "laboratory conditions" desirable for the conduct of a Board election (see Pet. App. B–8). And, as the court below correctly concluded (Pet. App. B–7 to B–8), the Board was not unreasonable in finding that the exclusion tended to have such an effect and in setting aside the first election on that ground.[6]

2. No substantial basis for setting aside the second election (which the Union won) is presented by

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[5] The Board and the court of appeals accepted as true the facts stated in the affidavit (R. 345–347) of Joe Boyd Neuhoff, an employee of the Company who was stationed at the main gate of the plant with instructions not to permit unauthorized persons on the premises during the election (Pet. App. B–5).

[6] Since the exclusion of the three employees was, without more, a sufficient basis for setting aside the election, the court below found it unnecessary "to consider the second issue, touching on the findings that company supervisory employees had questioned employees during the pre-election period" (Pet. App. B–8).

petitioner's contention that it was entitled to a hearing on whether the 13 individuals, who were denied ballots by Board agents on the grounds that they were supervisory personnel, were in fact in that category. As the court below pointed out, it was unnecessary to determine that issue, for "even if all thirteen of these persons had been permitted to vote and had voted against the union, this could not have affected the result" (Pet. App. B–8). Moreover, although the Company contended that the place and the manner in which the 13 individuals were denied ballots was improper, at no time before the Board was the basis for this contention particularized. Certainly, as the court below properly concluded (Pet. App. B–9), the denial of ballots by "an impartial Board representative," without more, does not provide a sufficient ground for setting aside an election or for holding an evidentiary hearing.[7]

3. There is no conflict among decisions. The cases relied on by petitioner in this regard (Pet. 8–9) are distinguishable, for in them, unlike here, it was found that the objections raised material issues of fact, requiring an evidentiary hearing.

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[7] Nor is a different conclusion required because of the Board's action in setting aside the first election. The Board could reasonably conclude that the exclusion of voters by a Company representative tended to create an atmosphere that prejudiced the election, whereas comparable action by a neutral Board representative neither created such an atmosphere nor indicated that the Board favored the Union in the election.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

EUGENE B. GRANOF,
Attorney,
National Labor Relations Board.

FEBRUARY 1967.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), are as follows:

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * * *

SEC. 9. (c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a ques-

tion of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

The relevant provisions of the National Labor Relations Board Rules and Regulations, Series 8, as amended (29 CFR Sec. 102.1 *et seq.*), are as follows:

SEC. 102.69 Election procedure; tally of ballots; objections; certification by regional director; report on challenged ballots; report on objections; exceptions; action of the Board; hearing.—

* * * * *

(c) If objections are filed to the conduct of the election or conduct affecting the result of the election, or if the challenged ballots are sufficient in number to affect the result of the election, the regional director shall investigate such objections or challenges, or both. If a consent election has been held pursuant to section 102.62(b), the regional director shall prepare and cause to be served on the parties a report on challenged ballots or objections, or both, including his recommendations, which report, together with the tally of ballots, he shall forward to the Board in Washington, D.C. Within 10 days from the date of issuance of the report on challenged ballots or objections, or both, * * * any party may file with the Board in Washington, D.C., eight copies of exceptions to such report * * *. If no exceptions are filed to such report, the Board, upon the expiration of the period for filing such exceptions, may decide the matter forthwith

upon the record or may make other disposition of the case. The report on challenged ballots may be consolidated with the report on objections in appropriate cases. If the election has been conducted pursuant to a direction of election issued following any proceeding under section 102.67, the regional director may (1) issue a report on objections or challenged ballots, or both, as in the case of a consent election pursuant to section 102.62(b), or (2) exercise his authority to decide the case and issue a decision disposing of the issues and directing appropriate action or certifying the results of the election. In either instance, such action by the regional director may be on the basis of an administrative investigation or, if it appears to the regional director that substantial and material factual issues exist which can be resolved only after a hearing, on the basis of a hearing before a hearing officer, designated by the regional director. * * *

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